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The Maryland Trust Act: The Fate of the Unknowledgeable Beneficiary

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ARTICLE

THE MARYLAND TRUST ACT: THE FATE OF THE UNKNOWLEDGEABLE BENEFICIARY

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When adopting its version of the Uniform Trust Code (the "UTC"), Maryland made two modifications to the UTC that potentially reduced the ability of trust beneficiaries to enforce their rights. First, the Maryland Trust Act ("MTA") did not include the UTC requirement that a trustee shall keep beneficiaries reasonably informed about the administration of the trust and of material facts necessary to protect their interests regardless of whether the beneficiary requests such information. Second, Maryland added to the "virtual representation" provisions of the MTA that a settlor can designate a representative regardless of the beneficiary's age or capacity to receive notice and provide consent on behalf of the beneficiary. These provisions taken together could significantly impair a beneficiary's ability to enforce a trust.

This article examines the implications of this shift away from a well-informed beneficiary including whether it defeats the purpose of a trust, accomplishes its stated goal, and whether these sections successfully abrogate the common law.

I. INTRODUCTION

The express trust has a long history, with its earliest form arising in the 14th century, and it "enjoyed a popularity at least from the reign of Edward III (1327-1377)."[1] English legal history scholar Frederic William Maitland famously described the trust as "the most distinctive achievement of English lawyers. It seems to us almost essential to civilization."[2] The impetus behind the UTC was the desire to clarify the common law as it had developed in a scattershot fashion among various states:

> The primary stimulus to the Commissioners' drafting of the Uniform Trust Code is the greater use of trusts in recent years, both in family estate planning and in commercial transactions,

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[1] R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1503 (1979).
[2] FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES, 23 (photo. reprint 1999) (A.H. Chaytor & W.J. Whittaker eds., 1st ed. 1909).

> both in the United States and internationally. This greater use of the trust, and consequent rise in the number of day-to-day questions involving trusts, has led to a recognition that the trust law in many states is thin … The Uniform Trust Code will provide States with precise, comprehensive, and easily accessible guidance on trust law questions. …
> Much of the Uniform Trust Code is a codification of the common law of trusts.[3]

Although the purpose of the UTC was to set out a "precise, comprehensive, and easily accessible guidance on trust law questions", neither the UTC codification of the law of trusts nor the MTA was meant to supplant the common law.

> The common law of trusts and principles of equity *supplement* this title, except to the extent modified by this title or another statute of the state.[4]

Paying tribute to the continuing vitality of the common law and the court of equity is an acknowledgement that the provisions of the UTC and the Maryland Trust Code are to be understood within the context of traditional trust law:

> The common law of trusts is not static but includes the contemporary and evolving rules of decision developed by the courts in exercise of their power to adapt the law to new situations and changing conditions. It also includes the traditional and broad equitable jurisdiction of the court, which the Code in no way restricts.[5]

By explicitly making the MTA operate within the broader framework of the common law of trusts and equitable principles, the MTA is even less susceptible to a reading that overturns the common law of trusts than other statutory provisions under Maryland decisional law.[6]

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[3] UNIF. TRUST CODE Prefatory Note (amended 2010).
[4] MD. CODE EST. & TRUSTS § 14.5-106 (emphasis added); *See also* UNIF. TRUST CODE § 106 (amended 2010).
[5] UNIF. TRUST CODE § 106 cmt. (amended 2010).
[6] See, *Antonio v. SSA Sec., Inc.*, 442 Md. 67, 74 (2015) ("There is, however, one important and particularly relevant interpretative principle reining-in our quest to elucidate the will of the Legislature: We will not presume abrogation of the common law unless the Legislature's intent to do so is clear. When the intent of the Legislature is unclear with regard to abrogation, we will interpret the statute to be congruent with the common law." (Internal quotation marks omitted)).

II. AT COMMON LAW THERE IS A DUTY TO KEEP THE BENEFICIARY INFORMED

"The duty to keep a beneficiary reasonably informed of the administration of the trust is a fundamental duty of a trustee."[7]

A. An Informed Beneficiary is Fundamental to a Trust

At its core, a trust is structured around relationships—a trustee holds property for a beneficiary.[8] "A trust … is a fiduciary relationship with respect to property, subjecting the person by whom the title is held to equitable duties to deal with the property for the benefit of another person …"[9] Without the ability of the beneficiary to enforce a trust, a trust does not exist:

> A [testator/settlor] who attempts to create a trust without any accountability in the trustee is contradicting himself. A trust necessarily grants rights to the beneficiary that are enforceable in equity. If the trustee cannot be called to account, the beneficiary cannot force the trustee to any particular line of conduct with regard to the trust property or sue for breach of trust. The trustee may do as he likes with the property, and the beneficiary is without remedy. If the court finds that the settlor really intended a trust, it would seem that accountability in chancery or other court must inevitably follow as an incident. Without an account the beneficiary must be in the dark as to whether there has been a breach of trust and so is prevented as a practical matter from holding the trustee liable for the breach.[10]

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[7] UNIF. TRUST CODE § 813 cmt. (amended 2010). *See also* UNIF. PROB. CODE § 7-303 (1969).

[8] Maitland, *supra* note 2 ("I should define a trust in some such way as the following —when a person has rights which he is bound to exercise on behalf of another or for the accomplishment of some purpose he is said to have those rights in trust for that other or for that other purpose and he is called a trustee.").

[9] RESTATEMENT (SECOND) OF TRUSTS, § 2 (1959).

[10] George Bogert, *The Law of Trusts and Trustees,* § 973 at 467 (Rev. 2d Ed. 1983) (as quoted in *Jacob v. Davis*, 128 Md. App. 433, 450 (1999)). *See also* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143, 201 (2002)("The duty to keep the beneficiaries reasonably informed of the administration of the trust is a fundamental duty of a trustee, for only by being informed can the beneficiaries know of and enforce their interests.").

So fundamental is the duty of a trustee to supply sufficient information to a beneficiary to assure protection of the beneficiary's rights, the Restatement (Second) of Trusts states that:

> Although the terms of the trust may regulate the amount of information which the trustee must give and the frequency with which it must be given, the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or to redress a breach of trust.[11]

The emphasis on a beneficiary's right to knowledge stems from the fact that the beneficiary is the primary individual with standing to enforce a trust.[12] As a result, an informed beneficiary is necessary to the survival of a trust because "[a]s a practical matter . . . beneficiaries who do not know of the trust's existence, or of their interests in it, would be unable to hold the trustee accountable."[13] This fundamental principle of the common law of trusts was articulated by an Ohio court in *In re Searight's Estate*. In that case, the Court determined that a trust for the benefit of a dog could not be a valid trust because "the absence of a beneficiary having a legal standing in court and capable of demanding an accounting of the trustee is fatal and the trust fails . . ."[14]

The common law's focus on the beneficiary of the trust appears throughout trust law. John Langbein, a Yale law professor with an expertise in trust and estate law, notes that a trust must be *for* the beneficiary.

> By refashioning the rule [against capricious purpose] to spell out that a valid trust must benefit the beneficiaries, the Third

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[11] RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. c (1959).

[12] The importance of this right of enforcement is highlighted by the fact that charitable trusts that do not have identifiable beneficiaries face serious enforcement problems. Because many of these trusts do not have identifiable beneficiaries, attorneys general are given the authority to enforce the trust, but they still have to be notified of a violation and have the time and resources to pursue enforcement. *See Holt v. College of Osteopathic Physicians and Surgeons*, 61 Cal. 2d 750, 754 (1964)(citing Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433 (1960)); George Gleason Bogert, *Proposed Legislation Regarding State Supervision of Charities*, 52 MICH. L. REV. 633 (1954); George Gleason Bogert, *Recent Developments Regarding the Law of Charitable Donations and Charitable Trusts*, 5 HASTINGS L. J. 95 (1954). *See also State Supervision of the Administration of Charitable Trusts*, 47 COLUM. L. REV. 659 (1947); *The Charitable Corporation*, 64 HARV. L. REV. 1168 (1951)).

[13] Bogert, *et al.*, *supra* note 10, at 965.

[14] *In re Searight's Estate*, 87 Ohio App. 417, 421 (1950) (citing *Mannix v. Purcell*, 46 Ohio St. 102 (1888)). The common law has been modified by statute to permit pet trusts as a form of "honorary trusts," but unless a specific exception exist, a trust must have a beneficiary. *See generally* Bogert, *et al. supra* note 10, at 166; MD. CODE ANN. EST. & TRUSTS § 14.5-407 (Trusts Created for the Care of Animals).

> Restatement and the Code articulate the policy that has been at work in these cases. As the court said in *Colonial Trust Co. v. Brown*[, 105 Conn. 261 (Conn. 1926)], a trust must advance "the interests of the beneficiaries of the trust."[15]

For these requirements to be met, however, the beneficiary must be identifiable. In his treatise on the law of trusts and trustees, Bogert explains that "[t]he settlor must select and identify the person or persons who are to be the beneficiaries in order to create such a trust. There are few real or apparent exceptions to this rule . . ."[16]

B. Settlors May Wish to Hide Trusts from the Beneficiaries

However central the beneficiary's right to information is to the efficacy of a trust, some settlors may want to limit a beneficiary's knowledge of the trust for his or her benefit:

> The settlor may believe that knowledge of the trust may have a harmful effect on the beneficiaries and that full disclosure of the trust will cause the beneficiaries to grow up feeling dependent, conflicted, or listless. The settlor may also fear that full disclosure of the trust will cause the beneficiary to challenge the trustee's authority. Some settlors worry that knowledge of trust interests will "demotivate" beneficiaries by "encouraging them to take up a life of ease rather than work and be productive citizens."[17]

Upbringing, not secrecy about wealth or other advantages, is a more likely antidote to the dreaded "trust-fund baby" syndrome. [18] In a survey of

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[15] John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U.L. REV. 1105, 1108 (2004).

[16] Bogert, et al., *supra* note 10, at 161.

[17] Kevin D. Millard, *The Trustee's Duty to Inform and Report under the Uniform Trust Code*, 40 REAL PROP. PROB. & TR. J. 373, 393 (2005) (Mr. Millard concludes that states "ought not follow the path" taken by a few jurisdictions stripping out entirely the date of a trustee to inform and report).

[18] SAMMY HAGAR & THE CIRCLE, TRUST FUND BABY (BMG Rights Management (US) LLC 2019); *Trust Fund Baby*, Sammy Hagar & The Circle, https://www.songfacts.com/facts/sammy-hagar/trust-fund-baby (last visited Apr. 3, 2019). Sammy Hagar & the Circle in their song "Trust Fund Baby," describe a trust fund baby as someone "hangin' with the Euro trash, getting into momma's stash [and] headed for a social crash." Mr. Hagar does not approve of the lifestyle. Mr. Hagar explained that his song describes "what happens when kids are given too much money—to [sic] early in life—and it becomes an affliction. All the money in the world

members of the California Fellows of the American College of Trust and Estate Counsel about the effectiveness of estate planning as a means of addressing concerns of irresponsible children, one Fellow wrote "[t]o my clients whose children are disappointments, lazy, or indolent and fail to live up to their potential I say that no device that I can draft will make up for lessons that were not learned as a child."[19]

> Parents mistakenly believe that what their children don't know won't hurt them. They rationalize that they won't create spoiled trust fund kids if their kids don't know they have a trust fund. The problem of course, is that they eventually will discover they have one and will be confused and upset about why their parents never informed them of it . . . Early on (usually by adolescence) tell your kids about the trust fund and explain that the trust has been established for them as a responsible member of the family.[20]

Peter Buffett, an individual who had potentially a high risk of succumbing to trust-fund baby syndrome, discussed his advice to wealthy parents in his book *Life is What you Make it: Finding your Own Path to Fulfillment*. Instead of recommending secret trusts, "[t]he son of billionaire investor Warren Buffet has an old-world spiritual message for today's money rich parents: teach your children values and do not give them everything they want."[21]

If values, morality and a developed sense of purpose are the keys to productive, fulfilled beneficiaries, trust secrecy is, at best, tangential to achieving those goals. In any event, settlors who may wish to keep beneficiaries minimally informed of a trust and its administration cannot entirely hide the existence of the trust from the beneficiaries under the common law.[22]

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isn't a guarantee for a good life. I'm a believer in working hard and finding purposeful work . . ." .

[19] Jon J. Gallo & James Grubman, *The Use and Abuse of Incentive Trusts: Improvements and* Alternatives, 45 U. MIAMI HECKERLING INST. ON EST. PLAN., ¶ 1300 (2011).

[20] Eileen Gallo & Jon Gallo, *Silver Spoon Kids* 199 (2002).

[21] Christine Kearney, *Warren Buffett's Son Preaches Values as Wealth*, Reuters Business News (May 10, 2010) https://www.reuters.com/article/us-books-buffett-idUSTRE64935220100510; Stephanie Asymkos, *How Billionaire Warren Buffet Ended Up with 3 Totally Normal Kids* (Peter Buffett's father Warren Buffet, agrees) https://finance.yahoo.com/news/billionaire-warren-buffett-ended-3-185016428.html (last visited Apr. 3, 2019).

[22] Trusts can, however, be tailored to reflect and protect the settlor's values. "Properly drafted trusts can encourage such goals as education, entrepreneurship, and involvement in philanthropy. . . [M]ost children will not resent behavior-related

Concerns about the trust fund baby syndrome are a primary impetus behind the shift away from an informed beneficiary.

C. The UTC Codifies the Common Law Rule Regarding the Trustee's Duty to Keep the Beneficiary Informed

The common law is not precise in delineating the exact nature of a trustee's duty to keep the beneficiary adequately informed: "[i]nterestingly, as fundamental as disclosure may be in trust administration, the duty to disclose is not precisely defined at common law and is far from uniform."[23] The UTC sought to rectify this ambiguity and inconsistency by making certain disclosures of information to beneficiaries a non-modifiable right.

These non-modifiable provisions are an exception to the general rule—present at common law, in the UTC, and in the MTA—that the terms of the trust[24] govern all aspects of the trust. Included among the non-modifiable provisions under the UTC are the duty to respond to a beneficiary's request for information and the duty to notify a beneficiary who is twenty-five years old or older of the existence of the trust, the identity of the trustee, and the beneficiary's right to information.[25]

Section 813 of the UTC articulates the common law rule that beneficiaries must be kept informed of the activity of the trust.[26] Adding specificity to the common law rule, the UTC lists the information that the trustee must provide to the beneficiary at certain times, but permits the settlor to waive certain of these disclosures.[27] David English, the Reporter for the UTC, noted that "[t]he

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clauses if the clauses reflect values that their parents communicated to them all." Gallo & Gallo, *supra* note 20

[23] Lauren Z. Curry, *Agents in Secrecy: The Use of Information Surrogates in Trust Administration*, 64 VAND. L. REV. 925, 926 (2011).

[24] The "terms of the trust" is a defined term meaning much more than the mere trust document. "'Terms of a trust' means the manifestation of the intent of the settlor regarding the provisions of a trust as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding" MD. CODE ANN. EST. & TRUSTS § 14.5-103(z). *See also* UNIF. TRUST CODE § 103(18) (amended 2010); Fred Franke & Anna Katherine Moody, *The Terms of the Trust: Extrinsic Evidence of Settlor Intent*, 40 ACTEC L.J. 1 (2014).

[25] UNIF. TRUST CODE § 105(8) & (9) (amended 2010). *See also* MD. CODE ANN. EST. & TRUSTS § 14.5-105(10) & (11).

[26] "Section 813 of the Code codifies this common law obligation, and, at the same time, adds detail and makes application of the duty more precise." David M. English, *The Uniform Trust Code* (2000)*: Significant Provisions and Policy Issues*, 67 MO. L. REV. 413, 199 (2002).

[27] *See* UNIF. TRUST CODE § 813 (amended 2010); David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 413, 202 (2002) ("Most of the specific disclosure requirements are waivable. Not waivable is the trustee's obligation to notify the qualified beneficiaries of an irrevocable trust

most discussed issue during the drafting of the UTC and subsequent to its approval is the extent to which a settlor may waive the above disclosure requirements."[28] The fact that certain specific types of notice—such as notifying the beneficiary within 60 days of the acceptance of a trusteeship—may be waived by the trust instrument does not necessarily mean that the general duty to keep a beneficiary informed, an articulation of the common law, may be waived.

The first sentence of UTC Section 813(a) is a general statement of a trustee's affirmative duty to keep a beneficiary informed. In its entirety, Section 813(a) states that:

> A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

According to the first sentence of Section 813(a), the trustee is bound to provide certain material information to the beneficiary regardless of whether such a beneficiary makes a request. The Comment to UTC Section 813 characterizes this duty as "a fundamental duty of a trustee."[29]

The affirmative duty to notify a beneficiary, absent a request, of material facts necessary for the beneficiary to enforce his or her rights is a restatement of the common law.[30] The Supreme Court of Delaware articulated the common law rule in *McNeil v. McNeil*, 798 A.2d 503 (2002). In that case, the Court held that a trust beneficiary did not need to request information that was necessary for him to enforce his rights. The trustee had a duty to provide that information to the beneficiary absent a request. In that case, the settlor ("Henry McNeil") created a trust that included his children and his wife as the current beneficiaries. Henry McNeil, however, did not treat his children as current beneficiaries of the trust. Also, one child, Hank McNeil ("Hank McNeil"), fell into disfavor during the parents' lifetimes. Hank McNeil did not know he was a current discretionary beneficiary of the trust. This was an "impression

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who are age twenty-five or older of the existence of the trust, of the identity of the trustee, and of the right to request trustee's reports.").

[28] David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 413, 202 (2002).

[29] UNIF. TRUST CODE § 813 cmt. (amended 2010).

[30] *See McNeil v. McNeil*, 798 A.2d 503, 506 (2002); *Rafert v. Meyer*, 290 Neb. 219, 224 (2015); *Trostle v. Trostle*, 77 S.W.3d 908, 914 (2002) (citing *Huie v. DeShazo*, 922 S.w.2d 920, 923 (Tex. 1996)).

apparently fostered by [Henry McNeil]"[31] and maintained by the trustees.[32] In other words, the trustees knew that the beneficiary had a misconception regarding his rights under the trust, and did not correct that misconception. Eventually, Hank McNeil brought an action against the trustees after his parents' deaths to demand a makeup provision for distribution he claimed should have been made all along. The court held that "even in the absence of a request for information, a trustee must communicate essential facts, such as the existence of the basic terms of the trust. That a person is current beneficiary of the trust is indeed an essential fact."[33]

The common law duty articulated by the Court in *McNeil* is the affirmative duty to inform a beneficiary of facts necessary to enforce the beneficiary's rights. It is the same duty articulated in the first sentence of UTC Section 813(a). The Court in *McNeil* found that duty existed despite the fact that the trust in that case gave the trustees "extraordinarily broad authority to manage the trusts."[34]

III. SECTION 813 OF THE MTA OMITS A KEY SENTENCE REGARDING THE TRUSTEE'S AFFIRMATIVE DUTY TO INFORM THE BENEFICIARY

The MTA omits the first sentence of Section 813(a) of the UTC. The MTA's version of Section 813 as compared to the UTC's is represented as follows with the portion of the UTC omitted by the MTA struck through and the additions to the UTC underlined:

> ~~A trustee shall keep the qualified beneficiaries of the trust reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests.~~ Unless unreasonable under the circumstances, a trustee shall promptly respond to the request of a qualified beneficiary~~'s request~~ for information related to the administration of the trust, including a copy of the trust instrument.

It is not clear that the omission indicates an intention to abrogate the common law rule. When interpreting a statute by examining the statute's Legislative history, the court views amendments that were considered and/or enacted as the statute passed through the Legislature and the statute's relationship to earlier and subsequent legislation as an external manifestation

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[31] *McNeil v. McNeil*, 798 A.2d 503, 506 (2002).
[32] *Id.* at 507.
[33] *Id.* at 510.
[34] *Id.* at 508.

and/or persuasive evidence of Legislative purpose. [35] Here, however, there is no indication that the Bill ever included the first sentence of Section 813(a) as it passed through the Legislature. The first draft of the MTA was introduced on November 13, 2013 and did not include the first sentence of Section 813(a).[36] Thus there is no indication that the legislature ever considered that provision or ever knew that it was a provision in UTC Section 813.

A. The MTA's Omission does not Abrogate the Common Law Duty

Setting aside the history and intention behind the omission, the fact remains that the MTA does not include the first sentence of UTC Section 813(a). Given the fact that the creation of a trust presupposes that a beneficiary may enforce its terms, it is doubtful a waiver by the settlor of the affirmative duty to inform a beneficiary of material facts relevant to that beneficiary's situation would be effective:

> [T]he UTC does not attempt to codify every aspect of trust law, and specifically provides that the common law of trusts and principles of equity supplement the UTC. Therefore, a purported waiver by a settlor of any aspect of the duty to inform and report is subject to the common law principle that a beneficiary is always entitled to information about the trust that is reasonably necessary to allow the beneficiary to enforce the trust.[37]

Given the primacy of a beneficiary's enforcement ability coupled with the MTA Section 14.5-106 (Common Law of Trusts and Principles of Equity), the omission of a sentence present in the UTC version of Section 813(a) is not a clear manifestation of intent to abrogate the common law.[38]

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[35] *SVF Riva Annapolis LLC, et al. v. Gilroy*, 459 Md. 632, 647, 696 (2018).
[36] H.B. 83, 2014 Leg., 434th Sess. (Md. 2014).
[37] Millard *supra* note 17, at 383 (citing *Briggs v. Crowley*, 224 N.E. 2d 417, 421 (Mass. 1967)*In Re Estate of Lang*, 302 N.Y.S. 2d 954, 957 (N.Y. Sur. Ct. 1969) (entitling beneficiaries of testamentary trusts to accounting; in terrorem clause in will purporting to negate benefits for any beneficiary request of the administration of the trust held void as against public policy); *Hollenbeck v. Hanna*, 802 S.W.2d 412, 414 (Tex. App. 1991); RESTATEMENT (SECOND) OF TRUSTS § 173, cmt. c (1959) (Regardless of terms of the trust purporting to limit information to be given to the beneficiary, "the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce the rights under the trust or to prevent or redress a breach of trust.")); *See also supra* Part II(C).
[38] *See also supra* note 6.

B. Limitation on Ability to Enforce

If MTA Section 813 were read to abrogate the trustee's common law duty to affirmatively keep the beneficiary reasonably informed about the administration of the trust and material facts necessary to enforce the beneficiary's rights, that departure from the common law would pose a danger to the institution of the trust.

Without this core duty, the trustee's duty can be reduced to (1) responding to a beneficiary's requests for information,[39] (2) notifying a beneficiary of its acceptance of a trusteeship,[40] and (3) notifying a beneficiary of the existence of a trust, identify of the settlor, right to request a copy of the trust, and right to a trustee report.[41]

In other words, the onus is on the beneficiary to seek out information regarding the trust. To be effective, the beneficiary must ask the correct question at the correct time to discover information that could show a breach of trust.

IV. SECTION 306 OF THE MTA PERMITS A SETTLOR TO DESIGNATE A REPRESENTATIVE TO RECEIVE NOTICE ON BEHALF OF A BENEFICIARY

Representation of a beneficiary's interest is not a new concept in the world of trusts. The difficulties of achieving notice and obtaining consent when beneficiaries are minor, unborn, incompetent, or otherwise unavailable has made representation a necessary provision of trust codes. [42] The MTA Section 306, however, is not a provision meant to alleviate the issue of obtaining consent or effectuating notice on unavailable beneficiaries.[43] Instead, it is a provision that permits a settlor to name a representative for a beneficiary regardless of the beneficiary's age, competence, or availability.

A. Representation Under the UTC

Article 3 of the UTC addresses two types of representation: fiduciary and virtual.[44] The holder of a testamentary power of appointment may represent and bind a beneficiary,[45] a fiduciary or parent may represent and bind a

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[39] MD. CODE ANN. EST. & TRUSTS § 14.5-813(a) (2017).
[40] *Id.* § 14.5-813(b)(1)(i) (2017).
[41] *Id.* § 14.5-813(b)(1)(ii) (2017).
[42] English, *supra* note 28, at 158 (noting that "achieving notice to or the consent of all of the beneficiaries is frequently difficult.").
[43] MTA Section 306 is codified at MD. CODE ANN. EST. & TRUSTS § 14.5-306 (2017).
[44] *See* UNIF. TRUST CODE Art. 3, general cmt. (amended 2010).
[45] *See* UNIF. TRUST CODE § 302 (amended

beneficiary,[46] a person with "substantially identical interests" may represent and bind a minor, disabled person, unborn person, or person whose identity or location is unknown,[47] a court-appointed representative may represent and bind a beneficiary.[48]

Each of the UTC's representation provisions is limited in some way. A representative who is not court-appointed is prohibited from acting when there is a conflict of interest. Under Section 302 (interest subject to power of appointment) the interest represented is subject to divestment via exercise of a power of appointment. Under Section 303 (fiduciary or parent), the representatives are bound by existing fiduciary standards. Under Section 304 (representation by person with substantially identical interests) the representative is, by definition, personally invested in the outcome. A court appointed representative under Section 305 must answer to the court for any action (or inaction) he or she undertakes. Finally, each of these provisions except the last one is limited by the phrase "only to the extent there is no conflict of interest between the representative and the person represented."[49]

The restricted scenarios where representation is permitted under the UTC highlights the emphasis that the UTC places on a beneficiary's involvement with and knowledge of a trust. Where representation is permitted, the UTC structures the representation in such a way that the interests being represented are securely protected.

B. Summary of Maryland's Section 306

Section 306 of the MTA[50] permits a settlor to designate an individual to serve as a beneficiary's representative. Section 301 of the MTA explains that

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[46] *See id.* § 303.
[47] *See id.* § 304.
[48] *See id.* § 305.
[49] *See id.* §§ 302–04.
[50] In its entirety, MD. CODE ANN. EST. & TRUSTS § 14.5-306 states as follows:

> (a) A settlor may:
>
> (1) Designate one or more persons who may serve as a representative or successor representative of a beneficiary of the trust;
>
> (2) Designate one or more other persons who may designate a representative or successor representative of a beneficiary of the trust; and
>
> (3) Specify the order of priority among two or more persons who are authorized under this title to serve as a representative or successor representative of a beneficiary of the trust.
>
> (b) Notwithstanding subsection (a) of this section, except as provided in § 14.5-303 of this subtitle, a person

notice to a representative "has the same effect as if notice were given directly to the other person . . ."[51] A representative may not also be trustee of the trust unless it is pursuant to Section 303 (addressing the representation of minor or disabled persons).[52] A representative serving under Section 306 is only liable for acts committed in bad faith.[53] Although the MTA was adopted in 2014, Section 306 was not adopted until 2017.

Section 301 permits some potential check on representation because a beneficiary can object to the representative. Notice given by a trustee to a representative will not be effective if served on a representative *after* the beneficiary has notified both the trustee and the representative of his or her objection.[54] Similarly, a representative's consent is not binding on the beneficiary if the beneficiary notifies both the representative and trustee of his or her objection before the consent would have become binding.[55]

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designated under subsection (a) of this section may not serve as a representative of a beneficiary of a trust if the person serves as a trustee of the same trust.

(c) (1) A representative designated under subsection (a) of this section may be held liable to the beneficiary on whose behalf the representative acts only if:

(i) The representative has undertaken or agreed to represent the beneficiary; and

(ii) Subject to paragraph (2) of this subsection, the representative's action or failure to act is proven by clear and convincing evidence to have been in bad faith with respect to the beneficiary.

(2) For purposes of determining liability under paragraph (1)(ii) of this subsection, a representative acts, or fails to act, in bad faith only if:

(i) The action or inaction was the result of intentional wrongdoing by the representative; or

(ii) The representative acted, or failed to act, with reckless indifference to the purposes of the trust or the interests of the beneficiary on whose behalf the representative acted.

[51] MD. CODE ANN. EST. & TRUSTS § 14.5-301(a) (2017).
[52] *Id.* §§ 14.5-306(b) & 303 (2017).
[53] *Id.* § 14.5-306(c) (2017).
[54] *Id.* § 14.5-301(a).
[55] *Id.* § 14.5-301(b).

C. Effect on Beneficiary's Ability to Enforce a Trust

Section 306 of the MTA limits a beneficiary's ability to protect his or her rights under a trust. The most obvious way that this limitation occurs is by diverting relevant information away from the beneficiary. Maine has a statute similar to Section 306 that permits a settlor to designate a representative for a beneficiary. A comment to Maine's statute states that the section was included "as a means to provide settlors with an option to prevent disclosure of the existence of the trust and details of the trust administration to qualified beneficiaries."[56] As detailed *supra* in Section II(A), knowledge of the existence of the trust and details regarding its administration are a prerequisite to a beneficiary's ability to enforce his or her rights under the trust.[57]

In addition to a beneficiary's alarming lack of enforcement ability, even if a beneficiary takes affirmative action to object to the representative—as provided in Section 301—and discovers information about a breach of trust, the additional time spent in uncovering the issue may mean that the beneficiary is barred by the statute of limitations. As Alan Newman noted, if a

> . . . trustee does not inform and report to a beneficiary about the trust, there is a significant possibility that the jurisdiction's version of [UTC's] section 1005(c) [setting the statute of limitations applicable to actions against a trustee] will bar a beneficiary's claim against the trustee for breach without the beneficiary having sufficient information about the trust, the beneficiary's interest in it, and the claim to protect his or her interest in the trust.[58]

The MTA's Section 904 sets a limitation of one year on a trustee's liability for a breach of trust. The limitation time begins from when "the beneficiary or the representative of the beneficiary is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the

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[56] ME. REV. STAT. ANN. tit. 18-B, § 105 cmt.

[57] A broad representation provision such as the Maryland Trust Act's § 306 is the exception - While most states have representation provisions similar to the UTC's or no representation provisions at all, some states including Connecticut, Delaware, Florida, Maine, Missouri, Ohio, Oregon, and Pennsylvania, have adopted provisions similar to Maryland's regarding a settlor's ability to appoint a representative for a beneficiary. *See* CONN. GEN. STAT. § 45a-487a–f; DEL. CODE ANN. tit. 2 § 3339; FLA. STAT. § 736.0306; ME. REV. STAT. tit. 18-B § 105; MO. REV. STAT. § 456.1-105 (3); OHIO REV. CODE ANN. § 5801.04; OR. REV. STAT. § 130.020; 20 PA. CONS. STAT. § 7780.3(k).

[58] Alan Newman, *You Don't Know What You've Got till It's Gone: The Time-Barred Claims Under the Uniform Trust Code*, 48 REAL PROP. TR. & EST. L. J. 459, 479–480 (2014).

beneficiary or the representative of the beneficiary of the time allowed for bringing a judicial action"[59]

Because the statute of limitations begins running when *either* the representative or the beneficiary receives the relevant notice, even a diligent beneficiary may be unable to enforce his or her rights.

A trust will not be as closely monitored by a representative as it would be by a beneficiary. This limitation on a beneficiary's ability to enforce his or her rights exists even if the representative is well-intentioned. While a beneficiary is motivated to enforce his or her rights, a representative who stands to gain nothing personally and has limited liability—as discussed *infra* at Part IV(D)—will be less diligent in monitoring the trust. "[I]t is only the beneficiaries of the trust who truly have an incentive to supervise the activities of the trustee and thus shifting the supervisory responsibility to others only begs the question of when would those 'others' have the duty to inform the beneficiaries."[60] This is true of the best-intentioned, diligent representative and only becomes more of a concern with less exemplary individuals.

Even more concerning to a beneficiary's ability to monitor a trust is the development of the non-judicial settlement agreement. A notable achievement of the UTC was the codification of non-judicial settlement agreements and, indeed, guidelines for what may constitute permissible judicial settlement agreements modifying the terms as expressed in the trust agreement. These provisions, however, coupled with the representation provisions, permit a trustee and the representative to modify the trust without ever consulting with or notifying the beneficiary.

D. Sequestering of the Fiduciary Duty

The trustee of a trust is held to a high fiduciary standard that requires it to put the interests of the beneficiary as its highest priority.[61] It is such a fundamental duty in the context of a trust that all fiduciaries are bound by it.

> Further, the loyalty rule applies to all fiduciaries and not merely to trustees, although as applied to some fiduciaries the duty is to act in the best interests of the beneficiaries rather

[59] MD. CODE ANN. EST. & TRUSTS § 14.5-904(a).

[60] Turney P. Berry, *The Whether, Why, Whom, What, and When of the Trustee's Duty to Notify Beneficiaries*, 45 U. MIAMI HECKERLING INSTITUTE ON EST. PLANNING ¶ 1450 (2011 U. of Miami).

[61] UNIF. TRUST CODE § 802 cmt. (amended 2010) (describing the duty of loyalty as "perhaps the most fundamental duty of the trustee");(the UTC's focus on loyalty to the beneficiary is not unique. It is a restatement of the common law); Bogert, et al., supra note 10, at 543 ("These rules derive from the common law and for the most part follow it. Section 802(a) states the basic rule, that a trustee shall administer the trust solely in the interests of the beneficiaries.").

> than in their sole interests. The duty of loyalty applies to agents, attorneys, executors and administrators, guardians and conservators, officers and directors of corporations, trustees in bankruptcy, receivers in receiverships, ERISA plan fiduciaries, joint ventures, and others representing persons who justifiably place trust and confidence in the representatives with regard to the management of business affairs. Loyalty is also required from that rather indefinite group who occupy a "confidential relation" and *de facto* have a high degree of control over the affairs of persons who are in an inferior position.[62]

A representative under MTA Section 306, however, is *not* a fiduciary. A representative is held to the far lower standard that he or she not act in bad faith.[63] Florida has a representation statute that is very similar to Section 306. In discussing that section, Cindy Basham writes that, "[a] designated representative is not a fiduciary and is not liable to the beneficiary whose interests are represented or to anyone claiming through that beneficiary for actions taken or omissions to act made in good faith."[64] Bashman also makes the interesting observation that the liability standard relating to the representative under Florida law can be modified by the terms of a trust.[65] Similarly, the MTA's Section 105 does not prohibit a settlor from modifying the liability standard applicable to a representative under Section 306(c).

Effectively, the representative acts as a buffer to the fiduciary duty. Before the representation provision, a beneficiary could wield the hefty sword of fiduciary duty to protect him or herself against wrongs done by the trustee. With a representative in place, the beneficiary's arsenal is reduced to the measly dagger of the bad faith standard. If a trustee provides information to a representative that discloses a breach of trust, and the representative takes no action within the relevant period, the beneficiary has *no claim* against the trustee.[66] The beneficiary's recourse would be to bring a claim against the representative claiming that the representative breached his or her duty.

While the representative's duty is identified as a good faith standard, MTA Section 306 further limits this standard so that it is even lower than a contract

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[62] Bogert, *et al*., *supra* note 10.

[63] MD. CODE ANN. EST. & TRUSTS § 14.5-306(c) (2017).

[64] Cindy Basham, S*hedding Light on Keeping Beneficiaries in the* Dark, 89 FLA. BAR J. 94, 95 (2015).

[65] *Id.* ("Furthermore, it is unclear whether the default and mandatory rules of F.S. §736.0105 allow a settlor to remove the good-faith requirement to which a designated representative is held. In any event, however, doing so may leave the beneficiary with little recourse.").

[66] *See* MD. CODE ANN. EST. & TRUSTS §§ 14.5-301; 904(a) (2017).

standard of good faith. According to MTA Section 306(c), the beneficiary would have to show by *clear and convincing evidence* that the representative's action or inaction was the result of his or her *intentional wrongdoing* or that it was the result of *reckless indifference* to the purpose of the trust or the interests of the beneficiary.[67]

The representative's duty to not intentionally act wrongly or act with reckless indifference is a far cry from Justice Cardozo's description of the fiduciary duty.

> Not honestly alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.[68]

The representative provision of Section 306 has buffered the fiduciary duty such that, in reality, a beneficiary may well be left with nothing but the conduct at a level no higher than "that trodden by the crowd."[69]

V. CONCLUSION

Trust law has developed with the beneficiary at its center requiring the trustee to serve with utmost loyalty to the beneficiary's interest.[70] Stepping away from that long history to minimize the information a beneficiary must receive and buffering the trustee from claims by the beneficiary poses a danger to the entire fabric of "the most distinctive achievement" of the common law.

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[67] MD. CODE ANN. EST. & TRUSTS § 14.5-306(c) (2017).
[68] *Meinhard v. Salmon*, 249 N.Y. 458, 4694 (1928).
[69] *Id.*
[70] Bogert, *et al.*, *supra* note 10.